ECORD
AND
RIEFS

No. 15-1204

IN THE

Supreme Court of the United States

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DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

MARK H. HADDAD
SEAN A. COMMONS
SIDLEY AUSTIN LLP
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

JUDY RABINOVITZ
MICHAEL K. T. TAN
CECILLIA D. WANG
AMERICAN CIVIL LIBERTIES FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2618

AHILAN T. ARULANANTHAM*
MICHAEL KAUFMAN
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-5211
aarulanantham@aclusocal.org

JAYASHRI SRIKANTIAH
STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-2442

Counsel for Respondents

* Counsel of Record

[Additional Counsel on Inside Cover]

January 31, 2017

DAVID D. COLE
AMERICAN CIVIL
LIBERTIES FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 544-1681

QUESTIONS PRESENTED

1) Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2) Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3) Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
BACKGROUND	3
SUMMARY OF ARGUMENT	7
ARGUMENT	15
I. PROLONGED DETENTION UNDER SECTIONS 1225(b)(1)(B)(ii) AND 1225 (b)(2)(A) WITHOUT AN INDIVIDUALIZED CUSTODY HEARING VIOLATES THE DUE PROCESS CLAUSE	15
A. Due Process Prohibits Prolonged Civil Detention Without Individualized Custody Hearings	16
B. The Due Process Prohibition On Prolonged Arbitrary Detention Applies To Arriving Subclass Members	19
C. The Parole Process Does Not Satisfy Due Process Requirements	24
II. PROLONGED DETENTION UNDER SECTION 1226(c) WITHOUT INDIVIDUALIZED CUSTODY HEARINGS VIOLATES THE DUE PROCESS CLAUSE	27
A. The Due Process Prohibition On Prolonged Arbitrary Detention Applies To Mandatory Subclass Members	28

TABLE OF CONTENTS—continued

Page

B. Due Process Requires Individualized Custody Hearings For Mandatory Subclass Members Because Their Detentions Are Prolonged And They Have Not Conceded Deportability 30

C. *Demore* Does Not Govern Here Because Mandatory Subclass Members Are Litigating Substantial Defenses 33

III. UNDER THE DUE PROCESS CLAUSE, DETENTION BECOMES PROLONGED AFTER SIX MONTHS, AND AN INDIVIDUALIZED CUSTODY HEARING IS REQUIRED 38

A. The Due Process Clause Requires A Custody Hearing For Class Members After Six Months Of Civil Detention 39

B. Requiring Class Members To Seek Relief From Prolonged Detention Solely Through Habeas Would Perpetuate The Denial Of Due Process 43

C. The Government's Position That Relief Should Be Available Only In Cases Of "Unreasonable Government Delay" Contravenes Settled Due Process Doctrine 47

IV. DUE PROCESS REQUIRES CERTAIN SAFEGUARDS AT CUSTODY HEARINGS FOR PROLONGED DETENTION 50

A. Due Process Requires The Government To Bear The Burden Of Proof By Clear And Convincing Evidence 50

TABLE OF CONTENTS—continued

	Page
1. The Government Must Bear the Burden of Proof	50
2. The Court's Precedent Requires the Standard of Proof To Be Clear and Convincing Evidence	51
3. Application of the *Mathews* v. *Eldridge* Due Process Standard Also Demonstrates That the Government Must Bear the Burden by Clear and Convincing Evidence	52
4. The Relief Ordered Below Is Consistent With the Court's Plenary Power Decisions	54
B. The Government Must Provide Periodic Hearings To Support Prolonged Detention	55
C. Immigration Judges Must Consider Length Of Detention At Prolonged Detention Custody Hearings	57
CONCLUSION	58

TABLE OF AUTHORITIES

CASES

Page

Addington v. *Texas*, 441 U.S. 418 (1979) 51, 52
Boumediene v. *Bush*, 53 U.S. 723 (2008)..... 20
Carlson v. *Landon*, 342 U.S. 524 (1952)..... 32, 33
Chavez-Alvarez v. *Warden York Cty. Prison*, 783 F.3d 469 (3d Cir. 2015)..... 46
Cheff v. *Schnackenberg*, 384 U.S. 373 (1966)..... 12, 40
Cty. of Riverside v. *McLaughlin*, 500 U.S. 44 (1991)..... 12, 16, 41
Cty. of Sacramento v. *Lewis*, 523 U.S. 833 (1998)..... 42
Demore v. *Kim*, 538 U.S. 510 (2003)..... *passim*
Din v. *Kerry*, 135 S. Ct. 2128 (2015)..... 55
Diop v. *ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011)..... 46
Duncan v. *Louisiana*, 391 U.S. 145 (1968)..... 12, 39, 42
Fiallo ex rel. Rodriguez v. *Bell*, 430 U.S. 787 (1977)..... 55
Foucha v. *Louisiana*, 504 U.S. 71 (1992) 17, 50
Hutto v. *Finney*, 437 U.S. 678 (1978) 16
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)..... 23
INS v. *Chadha*, 462 U.S. 919 (1983) 9
Jackson v. *Indiana*, 406 U.S. 715 (1972)..... 17, 56
Jean v. *Nelson*, 472 U.S. 846 (1985)..... 21
Judulang v. *Holder*, 132 S. Ct. 476 (2011)... 21
Kansas v. *Hendricks*, 521 U.S. 346 (1997) ... 51
Landon v. *Plasencia*, 459 U.S. 21 (1982)..... 8, 19
Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2494 (2016)..... 44, 45
Ly v. *Hansen*, 351 F.3d 263 (6th Cir. 2003) . 45
Maryland v. *Shatzer*, 559 U.S. 98 (2010) 12, 42

TABLE OF AUTHORITIES—continued

Page

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 52, 56
McNeil v. *Dir., Patuxent Inst.*, 407 U.S. 245 (1972) 12, 17, 40, 56
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 16
Muniz v. *Hoffman*, 422 U.S. 454 (1975) 39
Reid v. *Covert*, 354 U.S. 1 (1957) 20
Reid v. *Donelan*, 819 F.3d 486 (1st Cir. 2016) 44, 45, 46
Reno v. *Flores*, 507 U.S. 292 (1993) 33
Santosky v. *Kramer*, 455 U.S. 745 (1982) 52
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) ..... *passim*
Sopo v. *U.S. Attorney Gen.*, 825 F.3d 1199 (11th Cir. 2016) 43, 46, 47
United States v. *Hare*, 873 F.2d 796 (5th Cir. 1989) 57
United States v. *Ojeda Rios*, 846 F.2d 167 (2d Cir. 1988) 57
United States v. *Salerno*, 481 U.S. 739 (1987) 16, 51
Zadvydas v. *Davis*, 533 U.S. 678 (2001) ... *passim*

STATUTES AND REGULATIONS

8 U.S.C. 1158(d)(5)(A)(i) 53
1225(b) 2, 4
1225(b)(1)(B)(ii) 3, 9
1225(b)(1)(B)(v) 3
1225(b)(2)(A) 3, 4, 8
1226(a) 2
1226(c) 2, 10, 55
1229a 3
1229b 35
18 U.S.C. 3161(c)(1) 51

TABLE OF AUTHORITIES—continued

Page

8 C.F.R. 208.30(f) 3
1003.10(a) 25
1003.19(e) 55
1003.47 53
1236.1(d) 6

AGENCY DECISION

Matter of X-K-, 23 I&N Dec. 731 (BIA 2005) 5

OTHER AUTHORITIES

DHS, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)* (Dec. 7, 2012), https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-06252013.pdf 54

DHS, *Privacy Impact Assessment for the TECS System: CBP Primary and Secondary Processing* (Dec. 22, 2010), https://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-cbp-tecs.pdf 53

Border Security and Immigration Enforcement Improvements, Exec. Order, https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements 5

TRAC Immigration, *Immigration Court Processing Times by Outcome* (Dec. 2016), http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php 47

INTRODUCTION

The supplemental briefing order asks the parties to address whether the Constitution requires the relief ordered below. It does.

Freedom from physical incarceration lies at the heart of the liberty that the Due Process Clause protects. Every Class member has been incarcerated for at least six months without any individualized hearing where the Government has shown that further detention is needed. Absent the relief ordered below, most would likely remain in detention for a year or more without such a hearing. Respondent Alejandro Rodriguez's detention, for example, lasted over three years without a hearing and, without this litigation, would have continued for four more before he won his removal case. The Constitution does not permit incarceration of this length absent individualized custody hearings to ensure that detention serves a valid purpose and remains reasonable in relation to that purpose.

In the immigration context, detention becomes prolonged after six months. This Court has looked to that time period as significant in various contexts involving both civil and criminal confinement. National security cases aside, the Court has never permitted civil detention of longer than six months without an individualized custody hearing.

Class members do not maintain that they must be *released* after six months, only that the Government cannot detain them for prolonged periods without a *hearing* to determine whether continued detention is justified, or whether instead release under conditions of supervision is appropriate in light of flight risk or danger.

Of the three Subclasses at issue, two would be denied individualized custody hearings altogether absent the injunction. Arriving noncitizens held under color of 8 U.S.C. 1225(b) ("Arriving Subclass") were denied any opportunity for release before a neutral decision maker. The only officials who considered whether to release them prior to the injunction were the jailing authorities themselves, who conduct no hearing.

Those with certain convictions subject to mandatory detention under color of 8 U.S.C. 1226(c) ("Mandatory Subclass") were denied the opportunity for release altogether. In Petitioners' view, the law requires their incarceration, even for years, for however long their cases take to conclude.

The Government does provide custody hearings to the third subclass—those detained pursuant to 8 U.S.C. 1226(a)—but without the procedural safeguards ordered below to ensure that the hearings are meaningful. In all other contexts involving prolonged civil detention, due process requires the Government to bear the burden of proof by clear and convincing evidence. The conditions of prolonged incarceration, as well as most detainees' lack of counsel and English proficiency, make it fundamentally unfair to place the burden on them.

The relief ordered below also has proven workable. Hundreds of Class members have been ordered released under supervision because they presented no flight risk or danger, while in hundreds of other cases the Government has met its burden to justify continued prolonged detention.

BACKGROUND

The facts are set forth in detail in Respondents' brief, and therefore only summarized here. Resp. 5-11.[1] All Class members are in ongoing immigration proceedings and, accordingly, the Government has no present legal authority to deport them. Many will win their cases and never be ordered removed. If the Government prevails in a removal case, the individual is no longer a Class member. The Class excludes individuals detained under national security detention statutes. App. 5a-6a.

Prior to the injunction, all Class members were incarcerated for at least six months without a hearing where the Government demonstrated flight risk or danger to the community, the only valid justifications for continued detention in this context.

1. The Class is composed of three Subclasses. The "Arriving Subclass" consists of persons detained for more than six months who presented themselves at a port of entry and were screened in for a full removal proceeding under color of 8 U.S.C. 1225(b)(1)(B)(ii) or 1225(b)(2)(A). App. 108a.

a. Most Arriving Subclass members seek asylum. Upon presenting themselves at the border, they were interviewed by an asylum officer, who determined each had a "credible fear" of persecution in their home countries and, therefore, has a "significant possibility" of establishing eligibility for asylum. 8 U.S.C. 1225(b)(1)(B)(ii), (v). They have been referred for removal proceedings before an Immigration Judge (IJ) under 8 U.S.C. 1229a. 8 C.F.R. 208.30(f).

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[1] This brief refers to Petitioners' opening brief as "Br.", Respondents' prior brief as "Resp.", and Petitioners' reply brief as "Reply".

b. A minority of Arriving Subclass members are lawful permanent residents (LPRs) or others who presented facially valid entry documents at the border, but have been referred for removal proceedings because an immigration officer believed they were "not clearly and without a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). They are detained pending removal proceedings before IJs.

c. By definition, none of the Arriving Subclass members remain subject to the summary removal procedures applicable to most individuals at the border, *see generally* 8 U.S.C. 1225(b), and none have been "denied entry." *Cf. Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). The Government lacks legal authority to deport any of them, as their cases remain pending.

About two thirds of Arriving Subclass members won their cases, usually by obtaining asylum, even prior to the injunction (when all were detained). J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a.[2]

d. Prior to the injunction, all Arriving Subclass members were denied bond hearings before IJs. They received consideration for release only through the parole process—a cursory review conducted by field-level Department of Homeland Security (DHS) detention officers that includes no hearing, record, or

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[2] Petitioners claim that the Subclass includes people who were denied entry because it includes everyone detained under "Section 1225(b)," Reply 4 n.1. That is incorrect. While the parties and court used that terminology as shorthand, the Ninth Circuit's order reversing the denial of class certification specified the statutes at issue for each Subclass, App. 108a, and the only subsections of Section 1225(b) it mentioned are 1225(b)(1)(B)(ii) and 1225(b)(2)(A). The record concerning approximately 1,000 Class members contains no evidence of anyone detained under any other subsection of Section 1225(b).

appeal. Resp. 4. The Government has recently issued an Executive Order suggesting that releases through the parole process will decrease significantly. Border Security and Immigration Enforcement Improvements, Exec. Order, § 11(d) (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements.

In contrast to its treatment of Arriving Subclass members, all of whom presented themselves at the border, the Government provides individualized bond hearings to the far larger number of people who crossed the border without inspection and subsequently pass a credible fear interview. *See Matter of X-K-*, 23 I&N Dec. 731, 734 (BIA 2005); Br. of Social Science Researchers and Professors 8-9 (citing government statistics).

2. The "Mandatory Subclass" consists of individuals detained for more than six months under color of Section 1226(c). They do not challenge their initial mandatory detention, only their prolonged detention without a custody hearing. All Mandatory Subclass members have been detained for at least six months, and many for far longer. J.A. 92, tbl.20 (average of 427 days).

a. Individuals become subject to mandatory detention if an Immigration and Customs Enforcement (ICE) officer believes that they have been convicted of one of a broad range of criminal offenses—including certain misdemeanors and other minor crimes like simple drug possession. Under Petitioners' reading of the statute, IJs have no authority to consider them for release on bond based on flight risk and danger.

b. Mandatory Subclass members are detained longer than other people subject to mandatory detention because most have substantial defenses that take additional time to litigate—such as an argument that the charge of removal is invalid, or grounds for relief such as cancellation of removal. J.A. 77, tbl.7; 86, tbl.17; J.A. 121-22; App. 19a.

c. Nearly 40% of Mandatory Subclass Members won their cases even prior to the injunction (when all were detained). This was more than five times the success rate of the general detainee population. J.A. 95 & tbl.23; J.A. 135, tbl.38; App. 34a; J.A. 122, tbl.35. At least three quarters of them have a substantial defense to removal.

Among Class members with any criminal history, most of whom are in the Mandatory Subclass, more than half had no conviction with a sentence of more than six months, and many spent far longer in immigration detention than in criminal custody. J.A. 313-14; App. 34a.

3. The third subclass consists of individuals detained under Section 1226(a). Such individuals are apprehended in the interior of the United States and are not alleged to have a conviction that triggers mandatory detention.

These Subclass members do receive individualized custody hearings before an IJ. 8 C.F.R. 1236.1(d). Prior to the injunction, however, that hearing occurred only at the outset of their detention and the burden was on them to prove lack of flight risk or danger. Resp. 5. They could seek a new hearing only upon a showing that their circumstances had materially changed, but the passage of time—even of years—did not count as a changed circumstance (in the Government's view). J.A. 317; App. 46a-47a.

4. The injunction does not mandate anyone's release. It requires only a hearing to determine whether there is a factual basis for continued detention. Approximately half of those who have received hearings have remained in custody; the other half have been released on various conditions because an IJ concluded they did not pose a flight risk or danger that warranted detention. J.A. 526.

At the hearings, IJs consider whether the Government's immigration purposes can be served by imposing conditions of intensive supervision, including electronic ankle monitors with GPS tracking devices, rather than detention. App. 143a. Twenty thousand people each year are already supervised under the Intensive Supervision Assistance Program, J.A. 368, including many released under the injunction. This program has operated for over five years to ensure the appearance of between 94% and 100% of the thousands of people with removal cases who have been released under it, including "at or near 100%" in a region of Southern California where Class members reside, according to Petitioners' own witness. *See, e.g.*, J.A. 433, 565.

SUMMARY OF ARGUMENT

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001); *see also id.* at 718 (Kennedy, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."). The Due Process Clause thus permits civil confinement only when it serves a valid governmental purpose. Where the

Government's purposes can be served without incarceration, due process forbids it.

It follows that due process also requires procedures to ensure that detention serves its purpose. An individualized hearing before "a neutral administrative official" as to the purpose of detention is a bedrock due process requirement for civil detention. *Id.* at 721-23 (Kennedy, J., dissenting). And where detention becomes *prolonged*, due process requires enhanced protections to ensure that it remains reasonable in relation to its purpose.

In the immigration context, this Court has recognized only two valid purposes for civil detention—to mitigate the risks of danger to the community and to prevent flight. *Id.* at 690; *Demore* v. *Kim*, 538 U.S. 510, 528 (2003). If the Government can protect these interests without detention, then detention does not serve a valid purpose and violates the Due Process Clause. While this Court upheld brief immigration detention without individualized custody hearings as to the narrow class of individuals at issue in *Demore*, when detentions are prolonged, due process requires individualized custody hearings to ensure that detainees present a sufficient flight risk or danger to justify their prolonged detention.

I.

Arriving Subclass members are entitled to this basic constitutional protection. Those who are returning LPRs (detained under color of 8 U.S.C. 1225(b)(2)(A)) have due process rights even as to their admission. *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). It follows that these Subclass members also have the more basic due process right to be free from prolonged civil detention that is unnecessary, and

therefore the right to the procedural protection needed to vindicate that right.

Arriving Subclass members (detained under color of 8 U.S.C. 1225(b)(1)(B)(ii)) who have been found to have a "credible fear" of persecution, and have been referred for full hearings on their asylum applications, also have a constitutionally-protected interest in their physical liberty, for three reasons.

First, Respondents challenge the lack of procedures relating to their detention, not their admission. Petitioners defend prolonged detention without custody hearings as within the political branches' "plenary power," *see* Br. 14-15, 19-21, but the plenary power cases primarily concern "the power to expel or exclude" noncitizens, not the power to detain them. Br. 14. While the Government's power over admission and deportation may be "plenary," the power to subject people to prolonged incarceration is not. In any event, "[the plenary] power is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *INS* v. *Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose a "constitutionally permissible means of implementing [plenary] power"). Even if Arriving Subclass members have limited due process rights with respect to the procedures for admission, they still have a right to freedom from prolonged incarceration that is not needed to serve its purpose. *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious").

Second, the Arriving Subclass members who seek asylum have passed a critical threshold in the admissions process: an asylum officer has determined that they have a credible fear of persecution, and has referred them for full adjudication of that claim in

removal proceedings. Because they have been *screened in*, these Arriving Subclass members have a right that Congress has afforded them to be here while their asylum claim is pending. They therefore stand in a distinct position from the vast majority of noncitizens stopped at the border, who are not screened in but instead summarily excluded.

Finally, because Arriving Subclass members, unlike the vast majority of arriving noncitizens, have been found to have a credible fear of persecution, they cannot voluntarily end their detention by returning to the countries from which they fled. Those who flee persecution do not "hold the keys to their cell" in any meaningful sense.

The Court need not decide whether any of these considerations, standing alone, would trigger due process safeguards against unjustified prolonged detention. When these factors coincide, the Due Process Clause prohibits prolonged detention without an individualized custody hearing.

II.

The Due Process Clause also protects Mandatory Subclass members (detained under color of 8 U.S.C. 1226(c)) from prolonged detention without justification. Supervision programs have now been shown, in thousands of cases, to be extraordinarily effective at ensuring compliance with the terms of release, according to Petitioners' own witness. The relief ordered below merely allows Class members a custody hearing where an IJ *considers* release from prolonged detention under such programs.

Petitioners' central argument against individualized custody hearings rests on an overbroad reading of *Demore* v. *Kim*, 538 U.S. 510

(2003). Petitioners contend that, under *Demore*, immigration detention always remains permissible, regardless of its length, where it occurs for the purpose of enforcing the immigration laws. Reply 13.

Demore cannot be read so broadly, both because the opinion itself contains important limitations and because the Government's reading would contravene bedrock due process principles that limit the permissible length of civil detention without a custody hearing. *Demore* upheld the *brief* mandatory detention of individuals with qualifying convictions who had *conceded their deportability*, making entry of a removal order virtually inevitable. 538 U.S. at 522 n.6, 528. Mandatory Subclass members, by contrast, face prolonged detention and have substantial defenses to removal. Nearly 40% of them prevailed on their challenges to removal even prior to the injunction, when they were all forced to litigate their cases while detained.

Reading *Demore* without regard to these limitations to broadly authorize all immigration detention without individualized hearings, so long as the Government is pursuing removal proceedings in good faith, would set a sweeping precedent at odds with this Court's due process cases. Petitioners' view would support mandatory detention far beyond what Congress authorized in Section 1226(c) and this Court upheld in *Demore*.

III.

Our nation's legal tradition has long recognized six months as a substantial period of physical confinement, such that significant process is required to continue incarceration beyond that time. In the late 18th century, a jury trial was generally required for any crime punishable for more than six months.

Duncan v. *Louisiana*, 391 U.S. 145, 161 & n.34 (1968). Today, a federal court may not impose a sentence of more than six months unless the defendant has the right to jury trial. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion). Six months has also been considered an outer limit for confinement without individualized inquiry in civil contexts, including immigration. *McNeil* v. *Dir., Patuxent Inst.*, 407 U.S. 245, 249, 250-52 (1972); *Zadvydas*, 533 U.S. at 701; *see* Resp. 38. Outside the national security context, this Court has never authorized civil detention beyond six months without an individual hearing.

This Court also has long recognized that certain constitutional guarantees cannot be consistently enforced absent administrable bright-line rules. The Fifth Amendment's protection of personal liberty from unreasonably prolonged incarceration is one such guarantee. The custody hearings ordered below are precisely the type of practical time limit that this Court has imposed for the protection of basic constitutional rights. *E.g.*, *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010) (14 days); *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-56 (1991) (48 hours). This relief also was well within the lower courts' equitable discretion to remedy the extraordinary evidence of constitutional violations that pervades this record.

Thousands of Class members have been subjected to prolonged incarceration far beyond six months, with the average detention lasting over a year, and hundreds of individuals incarcerated for more than two years without a hearing. Such prolonged detention without review by a neutral decision maker far exceeds any length this Court has previously deemed consistent with due process norms. Hundreds

of Class members presented no flight risk or danger warranting continued detention; including victims of torture seeking asylum as well as longtime lawful residents convicted of relatively minor offenses, many of whom had U.S. citizen family members. Many of these detainees eventually won their cases. Nevertheless, prior to the injunction, they all remained in prolonged incarceration without any custody hearing to establish whether detention was in fact justified.

The record further confirms that the potential availability of habeas proceedings is insufficient to protect against widespread and unjustified prolonged detention. Habeas relief has long been theoretically available to all of these detainees; yet few can pursue it because detainees typically lack the requisite legal and linguistic resources. For those few who do pursue habeas relief, the lengthy time required to adjudicate their petitions means that most will remain subject to prolonged detention before a court ever resolves their petition. This evidence cannot be dismissed as mere "anecdote," Reply 15; it derives from a comprehensive study of one thousand Class members, and is confirmed by the findings of the circuit courts with a decade of experience considering prolonged immigration detention.

Petitioners' assertion that any custody hearing must take into account only whether the Government has engaged in unreasonable delay is misguided. The purpose of the hearing is to ensure that detention is actually needed to serve its purpose. Because the purposes of detention are to prevent danger and flight, those must be the focus of any hearing. While the question whether a detainee has engaged in dilatory tactics should be considered when assessing flight risk, a finding that DHS has engaged in

unreasonable delay cannot be a prerequisite for release, as Petitioners advocate.

IV.

The safeguards ordered by the district court—that the Government bear the burden by clear and convincing evidence, and that it conduct periodic hearings that consider the length of detention—are necessary to ensure meaningful protection against needless incarceration. They provide no more, and often far less, protection than do the safeguards provided to prolonged detainees in other contexts. Resp. 49-50, 55; *see also* Br. of Nat'l Ass'n of Criminal Defense Lawyers et al. 8-16.

Petitioners argue that the very limited procedural protections they advocate must suffice so long as they rest on a "facially legitimate and bona fide" justification. Br. 54 (citing *Fiallo ex rel. Rodriguez* v. *Bell*, 430 U.S. 787 (1977)). But that deferential standard derives from cases concerning the power of *admission*. This Court has never utilized it in any detention case, let alone one involving prolonged detention.

* * *

The regime of prolonged detention that Petitioners defend is far more draconian than any this Court has ever sanctioned outside the national security context. *Nowhere else in our legal system* is incarceration of this length permitted without the reasonable procedural protections ordered here. Resp. 17-19.

ARGUMENT

I. PROLONGED DETENTION UNDER SECTIONS 1225(b)(1)(B)(ii) AND 1225(b)(2)(A) WITHOUT AN INDIVIDUALIZED CUSTODY HEARING VIOLATES THE DUE PROCESS CLAUSE.

Due process requires individualized custody hearings to ensure that prolonged detention serves a valid purpose and remains reasonable in relation to it. *See infra* Point I.A.

This basic principle requires that Arriving Subclass members receive individualized custody hearings when detention exceeds six months. "[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious," *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). That rule applies to Arriving Subclass members both because they have *not* been denied entry but rather were referred for full removal proceedings, and because the interest in physical liberty extends, at a minimum, to people detained in the United States where Congress has afforded them a right to remain until their asylum cases are resolved. *See infra* Point I.B.

The existing detention review procedure wholly fails to satisfy minimal due process requirements, as it provides no hearing before a neutral decision maker and routinely leads to the prolonged detention of individuals who pose no flight risk or danger, thus rendering detention unnecessary and, for that reason, arbitrary. *See infra* Point I.C.

A. Due Process Prohibits Prolonged Civil Detention Without Individualized Custody Hearings.

Due process does not permit prolonged civil confinement absent an individualized hearing before a neutral decision maker to ensure that detention is actually necessary to serve its purpose. All of this Court's civil detention cases (outside the national security context) have required such hearings. Resp. 18. The Court has required hearings for far lesser interests, including for criminals seeking release on parole (despite their having already been sentenced to the full term of their confinement), and even for property deprivations. *See, e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); Resp. 27-28 (citing property cases).

This Court has often recognized the common-sense principle that prolonged deprivations of liberty require greater procedural protections than brief ones. For example, an individual can be detained on a police officer's finding of probable cause, but only for 48 hours. *McLaughlin*, 500 U.S. at 55-56. Further detention pending trial requires a "prompt" judicial hearing both to validate the police officer's probable cause finding and to determine whether the detainee presents too great a flight risk or danger to be released pretrial. *United States* v. *Salerno*, 481 U.S. 739, 747 (1987). Where trial proceedings become lengthy, still further process is required. *See* Resp. 57 (citing cases). *See also Hutto* v. *Finney*, 437 U.S. 678, 685-86 (1978) (holding in Eighth Amendment context that "it is equally plain ... that the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards").

The basic principle that due process requires more robust procedures when detention becomes prolonged

also runs throughout this Court's civil commitment doctrine. An individual found incompetent to stand trial may initially be held to attempt restoration, but only for a "reasonable period of time." *Jackson* v. *Indiana*, 406 U.S. 715, 733 (1972). Detention beyond the "initial commitment" requires additional safeguards, including individualized consideration of dangerousness. *Id.* at 736 (distinguishing *Greenwood* v. *United States*, 350 U.S. 366 (1956)). A state may commit a convicted prisoner to a mental institution "for observation limited in duration to a brief period" without additional procedures, but only because "lesser safeguards may be appropriate" for "short-term confinement." *McNeil*, 407 U.S. at 249-50. Similarly, "insanity acquittees may be *initially* held" on procedures less rigorous than those applicable to civil committees, but when detention becomes prolonged they must be afforded individualized hearings concerning flight risk or danger. *Foucha* v. *Louisiana*, 504 U.S. 71, 76 n.4 (1992) (emphasis added) (distinguishing *Jones* v. *United States*, 463 U.S. 354 (1983)).

This Court applied these principles to the immigration context in *Zadvydas*. 533 U.S. at 690-91. *Zadvydas* presumed the validity of detention for 90 days for individuals who had lost their cases and were awaiting removal, but required greater justification for those detained more than six months. *Id.* at 701. *See also Demore*, 538 U.S. at 529 (explaining this aspect of *Zadvydas*).

Petitioners contend that the due process principles articulated in *Zadvydas* do not apply here, both because in *Zadvydas* the immigration purpose had evaporated once no country would accept the detainees for repatriation, and because the detention at issue there was potentially permanent. Br. 37-38.

But *Zadvydas* did *not* limit its due process analysis to situations of "potentially permanent" detention. The Court relied on *Salerno*, which involves detention of finite length. 533 U.S. at 690. It rejected the Fifth Circuit's view that detention remains permissible so long as removal is not "impossible" and the Government acts in good faith. *Id.* at 702. The Court ruled instead that detention was authorized beyond six months only if removal was "significant[ly] likel[y] [to occur] in the reasonably foreseeable future." *Id.* at 701.

Zadvydas held that post-order detentions beyond six months require more scrutiny to ensure that they remain reasonable in relation to their purpose, not just that "potentially permanent" detentions are unauthorized. *See also* Br. 47 ("because longer detention [is] a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between means and the ends more closely") (citing *Zadvydas*, 533 U.S. at 701).

Thus, like other forms of civil detention, immigration detention that is unnecessary violates due process. If an individual does not present a flight risk or danger that warrants continued detention, the Constitution forbids it. And because *prolonged* detention requires more rigorous procedures to ensure that detention remains reasonable in relation to its purpose, when detention becomes prolonged due process requires the basic custody hearing authorized by the injunction.

B. The Due Process Prohibition On Prolonged Arbitrary Detention Applies To Arriving Subclass Members.

The Arriving Subclass—both the LPRs and the asylum seekers—are protected by these basic due process requirements. Resp. 27-32.

In *Landon* v. *Plasencia*, 459 U.S. at 34, the Court recognized that returning LPRs have due process rights even as to *admission*, where the political branches' power over immigration is greatest. Ms. Plasencia, a returning LPR, was arrested at the border after brief travel abroad. The Government conducted an exclusion hearing that lacked basic procedural protections, *id.* at 35-36, and argued that it need not provide additional process because she was seeking entry. *Id.* at 24. The Court, however, ruled that she "can invoke the Due Process Clause on returning to this country," *id.* at 32, and squarely rejected the Government's claim that "[w]hether different procedures should be adopted in the exclusion setting is for Congress, and not the courts, to decide." Br. For Petitioner 42, *Landon* v. *Plasencia*, No. 18-129, 1982 U.S. S. Ct. Briefs LEXIS 1223. In assessing Ms. Plasencia's rights, the Court applied traditional procedural due process doctrine, *see Plasencia*, 459 U.S. at 34 (citing, *inter alia*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

Plasencia thus forecloses Petitioners' assertion that apprehension at the border by itself extinguishes the liberty interests of Arriving Subclass members. And its holding that returning LPRs have "weighty" liberty interests because they "stand[] to lose the right 'to stay and live and work in this land of freedom,'" *id.*, forecloses Petitioners' argument that returning LPR Subclass members have no right to

individualized custody hearings. Resp. 31-32.[3] Because returning LPRs have constitutional rights with respect to the procedures governing their *admission*, they also have constitutional rights with respect to their *physical liberty*, a right that "lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 690.

The remaining Arriving Subclass members are asylum seekers found to have a "credible fear" of persecution, entitling them by law to protection against removal until, in a full removal hearing, an IJ has adjudicated their asylum claims. They too have due process rights against prolonged arbitrary detention.

First, these Subclass members seek procedures as to their detention rather than their admission. Procedural rights to ensure freedom from prolonged arbitrary detention arise from the Due Process Clause itself, not from a Congressionally-created right to admission. Thus, the Court need not address whether it remains the case that, in the admissions

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[3] *Plasencia*'s rejection of a formalistic test comports with cases adopting a functional approach even for those not in the United States. *See Boumediene* v. *Bush*, 553 U.S. 723, 764, 770 (2008) ("questions of extraterritoriality turn on objective factors and practical concerns, not formalism"); Law Professors Br. 16-18, 22-23. If the Constitution constrains the Government's power to detain foreign nationals as "enemy combatants" outside our borders in an armed conflict, surely it does so for Class members on U.S. soil. *See also Reid* v. *Covert*, 354 U.S. 1, 8 (1957) (plurality opinion) ("various constitutional limitations apply to the Government when it acts [abroad]").

While Petitioners note that the petitioner in *Mezei* was a returning permanent resident, he had forfeited the protections accompanying that status by his long absence. *Mezei*, 345 U.S. at 214.

context, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Mezei*, 345 U.S. at 212, (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)). *Compare Judulang* v. *Holder*, 132 S. Ct. 476, 485 (2011) (rejecting suggestion that Government could flip coins to decide discretionary relief applications); *Jean* v. *Nelson*, 472 U.S. 846, 854-55 (1985) (construing parole regulation to prohibit race discrimination and therefore not deciding whether *Mezei* applied). When the Government incarcerates people, it deprives them of liberty and must provide procedures to ensure that the deprivation is not arbitrary.

Zadvydas makes clear that the Government's power to exclude and its power to detain are distinct for due process purposes. The detainees there had lost all legal right to reside in the United States, but the Court nonetheless recognized their interest in "[f]reedom from . . . physical restraint," 533 U.S. at 690, which protects against arbitrary imprisonment "for any purpose." Resp. 27 (citing cases).

Seven of the nine justices in *Zadvydas* agreed on this point. Justice Kennedy, joined by Chief Justice Rehnquist, would have required procedures as to the detentions there, because "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." 533 U.S. at 721 (Kennedy, J., dissenting). *See also id.* at 692 (majority describing constitutional problem as "serious" and "obvious"). *See also* Law Professors Br. 19-20.[4]

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[4] Petitioners repeatedly assert that the *Mezei* dissenters would have approved of the draconian detention regime Petitioners advocate, ostensibly because Arriving Subclass

Petitioners maintain that *Mezei* precludes any due process protections here, because it upheld the summary exclusion and detention of a noncitizen denied entry. But while *Mezei* conflated the power to detain with the power to remove, that holding must be read in light of its peculiar circumstances: an exclusion resting on national security. Resp. 28-30; *see also* Br. of Law Professors 19-20, 23-25.[5] Mr. Mezei had been finally excluded *as a threat to national security*, and remained detained only because no country would accept him. As the Court explained, "to admit an alien barred from entry *on security grounds* nullifies the very purpose" of the exclusion order because it could unleash the very threat that the order sought to avoid. *Mezei*, 345 U.S. at 216 (emphasis added).

That rationale does not apply here. Individuals detained as national security threats are exempted from the Class, and releasing under supervision Subclass members who pose no flight risk or danger while their proceedings remain pending would not "nullify" the purpose of removal proceedings, which is to determine whether they may live here permanently. *See* Resp. 29.

Members receive hearings on the merits of their right to admission (i.e., removal hearings). However, the removal hearings provide no process with respect to detention, and the *Mezei* dissenters insisted on that right. *Compare* Br. 20 & Reply 7-8, *with Mezei*, 345 U.S. at 218 (Black, J., dissenting) ("The Founders abhorred arbitrary one-man imprisonments."); *id.* at 227 (Jackson, J., dissenting) (concluding that Mezei's *detention* could be enforced only through procedures "which meet the test of due process of law").

[5] *See, e.g.*, 345 U.S. at 207 (question presented "is whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention").

Second, these Arriving Subclass members have been screened in for full removal proceedings based on a finding that they have a "credible fear" of persecution. They thus stand in a fundamentally different position from Mr. Mezei, and from all other noncitizens at the border.

Whereas Mezei had lost any basis for seeking admission and been conclusively "denied entry," 345 U.S. at 212, these Arriving Subclass Members have passed a critical threshold in the admissions process, and their cases remain pending. Because they have been found (by a DHS asylum officer) to have a "significant possibility" of establishing eligibility for asylum, Congress has afforded them the right to remain here while their asylum applications are considered in full removal proceedings. And as the record in this case establishes, most will win the right to remain permanently. J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a.

Given that, under *Zadvydas,* individuals who had lost the right to live here nonetheless had a "liberty" interest in freedom from prolonged detention, noncitizens who *do* have a right to be here while their cases are adjudicated are entitled to at least as much due process protection. Unlike Mr. Zadvydas, they have *not* "been determined to be removable after a fair hearing under lawful and proper procedures." *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting).

Third, while some noncitizens detained at the border can avoid detention by returning home, Arriving Subclass members who seek asylum cannot. They face a "credible fear" of persecution. Resp. 2-5. Deportation "is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *INS* v. *Cardoza-Fonseca*,

480 U.S. 421, 449 (1987). The liberty interests of such individuals, who have often suffered horrific persecution and torture in their countries of origin, cannot be dismissed on the ground that they are free to go home, particularly given record evidence establishing that two-thirds of those initially found to have a "credible fear" won their cases even before the injunction. *See, e.g.*, J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a. *See also* J.A. 229 (Class member fled Ethiopia after government soldiers kidnapped and tortured him with electric shocks over the course of six months, and killed his father and brother); J.A. 227 (Class member abducted, burned, and deprived of food for days).

C. The Parole Process Does Not Satisfy Due Process Requirements.

Petitioners suggest that even if Arriving Subclass members have some liberty interests, the parole review process satisfies constitutional requirements. Reply 10.

The parole process does not satisfy due process. It includes no hearing before a neutral decision maker, no record of any kind, and no possibility for appeal. Outside the national security context, this Court has never permitted detention of such length without the basic requirement of a hearing before a neutral decision maker. And seven Justices in *Zadvydas* would have required such procedures even as to individuals who had conclusively lost the right to reside here. *See supra* Point I.B. *See also Zadvydas*, 533 U.S. at 723 (Kennedy, J., dissenting) (release processes "could be conducted by a neutral

administrative official") (citing *Morrissey*, 408 U.S. at 486).[6]

The record contains extensive evidence that the parole review process gives rise to prolonged arbitrary detention. Resp. 4-5, 30-31. Reviews are conducted informally by DHS officers (i.e., the jailing authorities). Officers make parole decisions—that result in months or years of additional incarceration—by merely checking a box on a form that contains no factual findings, no specific explanation, and no evidence of deliberation. *See, e.g.*, J.A. 234-35 (denying release, for however long proceedings will continue, because detainee was "flight risk" with no further explanation). There is no hearing, no record, and no appeal. J.A. 225-26, 334-35; App. 39a. The parole system lacks meaningful processes to correct even manifest errors, as Petitioners' own witness conceded. J.A. 226-34; App. 39a-40a. *See also* Resp. 6-7 (citing examples); Br. of Human Rights First et. al. 18 n.9; Br. of Americans for Immigrant Justice et. al. 21-27.[7]

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[6] IJs are akin to the neutral officials contemplated in *Morrissey* rather than "judicial officer[s]," 533 U.S. at 723 (Kennedy, J., dissenting), insofar as they serve under the direction of the Attorney General. *See* 8 C.F.R. 1003.10(a). In any event, while the analogy to post-conviction parole was appropriate in *Zadvydas*, which concerned individuals who had "been determined to be removable after a fair hearing under lawful and proper procedures," *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting), Arriving Subclass members are entitled to greater protections because they have not lost the right to live here.

[7] Petitioners claim the record evidence concerning egregious errors was contested, *see* Reply 11 n.3, but in each example cited the IJ ultimately resolved any factual disputes in the Subclass member's favor at their asylum hearings. For example, in the case identified by Petitioners, *see id.*, an Ethiopian man was

Petitioners do not contest that a large majority of Arriving Subclass Members win their cases.[8] Nor do they dispute their own witness's testimony that virtually none of the members of this Subclass have any criminal history. J.A. 98, tbl.28; J.A. 135, tbl.38; J.A. 328; App. 20a, 40a. While there was some disagreement on the margins about how to count detention lengths, *see infra* n.9, three points are not in dispute: Petitioners detained Arriving Subclass members without hearings for extremely long periods, J.A. 97, tbl.27; App. 40a (average of one year using method correcting for all sources of measurement bias); the parole process lacks any opportunity for detainees to be heard by a neutral decision maker; and, as Respondents' own witness testified, the parole process has no mechanism to catch even manifest errors committed by the detention officers because they exercise sole, unreviewable authority as to release. It routinely results in months, and often years, of pointless incarceration. J.A. 334-35, 339. *See generally* J.A. 226-35; App. 39a-40a.

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denied parole and detained for six months based on an erroneous finding that he was Somali and the officer's biased view that all Somalis were deceitful. The IJ ultimately granted him asylum from Ethiopia, after finding him credible and confirming his actual nationality. Decl. of Ahilan Arulanantham at 6, ECF No. 281-73 (observing that "[w]hen the DHS found that he had established a credible fear of return *on the exact same facts as he testified before this Immigration Court*, the DHS had apparently concluded that his lack of identity documents was not an issue" and that DHS conceded his "identify and name had properly been verified pursuant to" regulation).

[8] Petitioners' expert acknowledged that the parties' initial disagreements on detention lengths did not affect the case outcome data. J.A. 173.

No other detention regime permits the jailing authority to impose months or years of civil confinement simply by checking a box on a form, with no hearing, no record, and no appeal. Outside the national security context, the Court has never approved such prolonged periods of detention based on such cursory review. Where, as here, detention has become prolonged, due process requires individualized custody hearings to ensure that continued detention remains justified.

II. PROLONGED DETENTION UNDER SECTION 1226(c) WITHOUT INDIVIDUALIZED CUSTODY HEARINGS VIOLATES THE DUE PROCESS CLAUSE.

The due process requirements that govern prolonged detention also protect members of the Mandatory Subclass. They are detained for prolonged periods, on average more than *ten times* the average length in *Demore*. And the vast majority of them contest the entry of a removal order in their cases, whereas *Demore* was "decide[d] . . . on [the] basis" that the detainee had conceded deportability. 538 U.S. at 522 n.6.

Petitioners read *Demore* without regard to these limitations, claiming it exempted immigration detention from basic due process requirements in the civil detention context, and authorized prolonged detention without hearings, "so long as [it] serve[s a] 'purported immigration purpose,'" Reply 13, irrespective of whether prolonged detention *actually* serves a purpose and remains *reasonable* in relation to that purpose.

But *Demore* did not exempt detention under Section 1226(c) from basic due process principles. Rather, it applied those principles to the challenge at issue

there, which concerned individuals who were charged with certain criminal convictions, detained for brief periods, and who had conceded deportability. Those factual circumstances were critical to the Court's holding. Brief detention involves a comparatively minor deprivation of liberty, and the Government's interest in detaining someone to ensure removal nears its height where entry of a removal order is virtually certain. Ignoring *Demore*'s own limitations would set a sweeping precedent permitting detention far beyond what this Court has previously authorized.

Due process analysis also must consider that supervised release programs have now been shown, in thousands of cases, to be extraordinarily effective at ensuring compliance according to Petitioners' own witness. This is unsurprising, as the record shows that many Mandatory Subclass members are longtime lawful residents convicted of relatively minor offenses. The system Petitioners advocate, by contrast, utilizes a conclusive presumption—demonstrably false on the record in this case—that all Subclass members present too great a risk to be released under any conditions, even if the Government can make no showing of need. Due process does not permit the use of that conclusive prohibition when prolonged detention is at stake.

A. The Due Process Prohibition On Prolonged Arbitrary Detention Applies To Mandatory Subclass Members.

Due process does not permit prolonged incarceration absent an individualized hearing before a neutral decision maker to ensure that detention remains justified. *See supra* Point I.A.

That basic due process principle applies to the Mandatory Subclass. While this Court upheld detention without individualized custody hearings in *Demore*, that case involved an application of the principles underlying the Court's civil detention doctrine, not an abrogation of them.

Most important, *Demore* found the detention at issue permissible without individualized custody hearings because it was "brief," 538 U.S. at 513, 523. *Demore* distinguished *Zadvydas* on precisely this ground, stating that most detentions before it were shorter than the ninety days of mandatory detention *Zadvydas* permitted. 533 U.S. at 698.

Demore also limited its holding to detainees who had conceded their deportability, and therefore had little to lose by fleeing. 538 U.S. at 522 n.6 (case "decide[d] . . . on that basis"); *id.* at 518 (rule applies to a "*limited class of deportable* aliens") (emphasis added); *id.* at 521 (mandatory detention applies to "a subset of deportable criminal aliens").

As a result, *Demore* involved both less serious deprivations of liberty and stronger government interests than those at issue here. *See, e.g.*, *id.* at 513, 523.

Petitioners ignore these limitations, claiming *Demore* exempted the immigration detention system as a whole from this Court's civil detention precedent. Reply 11-12. In Petitioners' view, detention remains permissible, regardless of length, "so long as immigration detention continues to serve a purported immigration purpose." Reply 13. But detention does not serve an immigration purpose if the Government's interests can be met without incarceration. If an individual does not pose a sufficient flight risk or danger to warrant detention,

then the Government can accomplish its immigration purposes without detention, and detention serves no immigration purpose. And while *Demore* upheld Congress' categorical denial of release for *brief* detentions of persons who conceded deportability, it neither considered nor permitted *prolonged* detention without any individualized assessment of whether detention is justified, particularly as to those who do not concede that they will be ordered removed.

If accepted, Petitioners' attempt to extend *Demore* to authorize prolonged detention would constitute a dramatic expansion of the Government's authority to deprive noncitizens of their liberty, far beyond that authorized in *Demore* or any other case. If incarceration *always* remains permissible, regardless of its length or the detainee's individual circumstances, so long as the Government is pursuing removal proceedings in good faith, then detention will almost always be lawful while proceedings remain pending, with or without individualized custody hearings. On Petitioners' view, it does not matter whether the Government's immigration interests can actually be served without detention. That view would sanction unnecessary, and therefore arbitrary, detention.

B. Due Process Requires Individualized Custody Hearings For Mandatory Subclass Members Because Their Detentions Are Prolonged And They Have Not Conceded Deportability.

Mandatory Subclass members are detained for periods far longer than those the Court considered in *Demore*. Petitioners ignore *Demore*'s unambiguous statement that in 85% of the cases it considered, the average detention time was 47 days. 538 U.S. at 529. *Demore* assumed that, in outlier cases, mandatory

detention would "last [] . . . about five months in the minority of cases in which the alien cho[se] to appeal," *see id.* at 529-30, although that assumption was based on data provided to the Court that the Solicitor General now admits was incorrect.

Here, by contrast, detention exceeds six months *in every case* under the class definition, and the average detention for Mandatory Subclass members is nearly *ten times* more than the average in *Demore*. J.A. 92, tbl.20 (427 days). Even for appeals, the average is *three times* what *Demore* envisioned. J.A. 76, tbl.6 (448 days).[9]

Petitioners make much of the fact that the detainee in *Demore* was detained for slightly more than six months, but fail to note that he never claimed that his detention without a hearing was unlawful *because of its length*, and never sought a remedy for *prolonged* detention. *Demore*, 538 U.S. at 523 (explaining that

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[9] Petitioners' claim that many Class members' detention lengths are actually comparable to those in *Demore* rests in part on a mistake in their interpretation of the relevant data. Reply 12 & n.4. Petitioners focus on the so-called "in-period" detainees when citing data concerning detention length—those who became Class members only after the discovery period commenced. However, as Petitioners' own expert acknowledged, reliance solely on those detainees' data significantly skews average detention lengths because it tracks detention for only about two years, and therefore "censors" detention time. J.A. 172-73. *See also* J.A. 117, 126-27. Respondents' expert utilized a method that corrected for the different sources of measurement bias. Petitioners' expert did not dispute that Respondents' expert's method is "the standard method used by statisticians to correct for censoring bias" in situations involving offsetting forms of selection and censoring bias, J.A. 133, or that her method produced "the most reliable [results] on the average detention length for all individuals who qualify or will qualify as class members in the future." J.A. 134. That data is reported at J.A. 71-74, 92, 97.

Mr. Kim challenged even "brief" detention without a bond hearing under Section 1226(c)).

Moreover, *Demore*'s citation to average statistics for all mandatory detainees makes clear that the Court viewed Mr. Kim's case as involving unusually long detention. That assumption was correct as to the data at issue in that case, which focused on *all detentions* under Section 1226(c). Respondents, however, do not challenge the constitutionality of most detentions under Section 1226(c). Their challenge is limited to detentions exceeding six months. Mr. Kim's detention would have been unusually *short* were he a Class member. Nearly 90% of the studied Class members were detained for longer than Mr. Kim as of the time the Court ruled on his case (197 days). J.A. 73, tbl.3.

Petitioners cite no reason or authority for their claim that the "proper focus" of review here must be on "*all* aliens detained under Section 1226(c)," regardless of whether the detention has become prolonged, Br. 45. This case is *not* a challenge to Section 1226(c) detention "as a whole," *see id.* at 29 n.9, but only to the application of that statute to individuals detained for more than six months.

Petitioners' assertion that *Demore* authorizes prolonged mandatory detention also ignores the cases on which it relied, which carefully limited their holdings (as did *Demore* itself) so as not to authorize prolonged detention.

Demore relied heavily on *Carlson* v. *Landon*, 342 U.S. 524, 546 (1952), which made clear that it was not addressing prolonged detention. *See Demore*, 538 U.S. at 523-25. The detainees in *Carlson* challenged the Government's authority to detain them solely on the basis of dangerousness while their removal cases were pending. 342 U.S. at 526-27. *Carlson* upheld

their detention, but stressed that the "problem" of "unusual delay in deportation hearings is not involved in this case." *Id.* at 546. Subsequent cases recognized that *Carlson* had so limited its holding. *See Zadvydas*, 533 U.S. at 691 (recognizing that *Carlson* did not consider the "problem of . . . unusual delay") (omission in original); *Mezei*, 345 U.S. at 216 n.13 (noting that *Carlson* explicitly declined to consider cases of "unusual delay,"); *id.* at 223 (Jackson, J., dissenting) (citing *Carlson* for proposition that "[e]ven the resident, friendly alien may be subject to executive detention without bail, *for a reasonable period*") (emphasis added).

Demore also relied on *Reno* v. *Flores*, 507 U.S. 292, 309 (1993), which upheld the brief custodial detention of children while removal proceedings are pending. Bond hearings were available, *id.* at 299, but *Flores* nonetheless emphasized the brevity of the detention at issue. *Id.* at 314 (average of 30 days). In responding to plaintiffs' claim that the scheme could authorize more prolonged detention, the Court stressed that proceedings "must be concluded with 'reasonable dispatch,'" and that there was "no evidence" of detention "for undue periods" or that "habeas corpus is insufficient to remedy particular abuses." *Id.* Here, there is ample evidence of both. Resp. 8, 23; *infra* Point III.B.

C. *Demore* Does Not Govern Here Because Mandatory Subclass Members Are Litigating Substantial Defenses.

Subclass members' prolonged detention renders *Demore* inapplicable not simply because of its length, but also because of the reasons underlying their lengthy proceedings. Unlike the detainee in *Demore*, the vast majority of Subclass members take time to

litigate their cases because they have substantial defenses to removal. Br.19-21.[10]

Individuals who have substantial defenses, and therefore have an opportunity to maintain the right to reside in the United States as a result of their removal proceedings, do not present the presumptive flight risk or danger concerns that underlie *Demore*. Such individuals have obvious incentives to appear for proceedings that deportable noncitizens do not have, because individuals with substantial defenses may avoid entry of a removal order by appearing for proceedings. Such individuals also generally have stronger ties to this country and less serious criminal histories than other people detained under Section 1226(c). *See generally* Brief of National Immigration Project of the National Lawyers Guild 13-16. And because they are far more likely to win their cases, the risk that they will flee is correspondingly diminished, as is the Government's interest in detaining them.

In contrast, *Demore* repeatedly limited its holding to "deportable criminal aliens," 538 U.S. at 521, and in doing so focused on noncitizens as to whom entry of a removal order was virtually inevitable. *See, e.g.*, *id.* at 518 (Section 1226(c) enacted because "INS

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[10] Individuals were classified as having a substantial defense if they contested whether their offense triggering mandatory detention or if they were eligible for relief that would prevent entry of a removal order. While the Government does keep data on whether individuals apply for relief, it does not track whether someone contests the charges; it tracks only whether such challenges are successful. 70% of Subclass members were eligible for relief from a removal order, and 4% won their challenges to the threshold charge of removability. J.A. 95-96. Therefore, more than 74% of Subclass members presented a substantial defense.

could not even identify most deportable aliens, much less locate them and remove them from the country.") (emphasis omitted); *id.* (relying on study regarding the time needed to "remove every criminal alien already subject to deportation"); *id.* (referring to "INS' near-total inability to remove deportable criminal aliens").[11]

Entry of a removal order is *not* inevitable as to the overwhelming majority of Section 1226(c) Subclass members. At least three quarters of Subclass members have a substantial defense that, if successful, will prevent entry of a removal order. Resp. 19. Thirty-eight percent of them won their cases even while detained. J.A. 135. *See also* J.A. 520-23, 574-75 (detention makes litigation far more difficult).

For example, the most common form of relief for which Subclass members are eligible is LPR cancellation of removal. 8 U.S.C. 1229b; J.A. 94, tbl.22. By definition, such individuals had no aggravated felony conviction and at least seven years of lawful residence, including five as LPRs. Forty-nine percent of studied Subclass members were eligible for that form of relief, J.A. 94, tbl.22, and 39% of those that sought relief won it. J.A. 95, tbl.23.

Petitioners contend that Congress rejected the type of individualized assessments that would allow

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[11] *Demore* was particularly focused on people convicted of aggravated felonies, as Mr. Kim allegedly was. *See* 538 U.S. at 518 (specifically referencing aggravated felonies); *id.* at 520 n.5 (rejecting reliance on study that included only a small number of people with aggravated felony charges); *id.* at 521 (relying on legislative history specifically about people convicted of aggravated felonies). Virtually all Subclass members with substantial defenses are *not* convicted of aggravated felonies. *See infra* Point III.B.

consideration of whether a detainee has a substantial defense because "*IJ*s could not predict ex ante which released criminal aliens would reoffend or flee." Reply 15 (emphasis added). But this statement appears nowhere in *Demore* or the legislative history. Rather, *Demore* stated that the evidence Congress considered in the early 1990's showed that "in practice" *the INS* released people due to "limitations on funding and detention space," 538 U.S. at 519, not after IJ hearings on flight risk and danger. And the evidence about those "discretionary release" programs concerned "deportable criminal aliens," not people with substantial defenses. *Id.* at 528.

The record demonstrates the Government has since implemented intensive supervised release programs. It contains the results of thousands of cases by IJs operating under the injunction—information not available when this Court decided *Demore*. Each year, approximately 20,000 people receive supervised release under the intensive supervision programs. J.A. 407, 385. Compliance rates in some regions stand "at, if not close to, 100 percent," J.A. 565, and they are comparably high nationwide. J.A. 433.

Petitioners contend these supervision programs achieve high compliance rates only for "low risk individuals." Reply 16 (citing J.A. 364). Many Subclass members *are* low risk, because the Government interprets Section 1226(c) to require the detention of people convicted of simple drug possession and other minor offenses, even if they have lived here lawfully for years and have a substantial defense to removal. *See, e.g.*, J.A. 314 (Class members detained for 600 to 750 days based on simple possession offenses with sentences of 30 to 90 days); Resp. 39 (individuals detained for years for drug possession granted bond after IJ hearings). *See*

also J.A. 566-67 (Government witnesses acknowledging individuals with substantial challenges present lower risk).[12]

In any event, the question is not whether all Subclass members should receive supervised release, but whether IJ's may *consider* supervised release and order the release of individuals who need not be detained when supervision would adequately serve the Government's interests. Such *consideration* ensures that detention actually remains justified.

The Court should reject Petitioners' remaining arguments concerning the Mandatory Subclass. They quarrel with the definition of "substantial defenses," which they say should be limited to whether "the charges ... are valid." Reply 14. The definition properly focuses on whether detainees can expect to *win their cases* by maintaining their immigration status; such individuals have powerful incentives to appear and already present little danger because of their comparatively minor criminal histories.

Petitioners claim the detainee in *Demore* sought relief, Reply 15, but he sought withholding of removal, which does not qualify as a "substantial defense" because it does not prevent entry of a removal order, and therefore does not bar removal to third countries or even to their own country under

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[12] Petitioners rely on inapposite and unreliable extra-record data purportedly bearing on flight risk. Resp. 41. They offer no response to the serious flaws in the data, inviting the same types of data errors that occurred in *Demore*. *Id.* Unlike in the cases on which they rely, Reply 16 (collecting cases), Petitioners had ample opportunity to develop a record during discovery. Petitioners claim Respondents cited an extra-record study, Reply 16, but Respondents' purpose was to illustrate the flaws in Petitioners' extra-record data, not to displace the record. J.A. 564-65.

some circumstances. Brief of National Immigration Project of the National Lawyers Guild 8 n.6. Petitioners also contend the record evidence "exaggerates" the prevalence of substantial defenses because it fails to assess the strength of each case. Reply 15. However, only IJs could conduct such assessments, and while the injunction permits them to do so when considering whether to grant bond, Petitioners' approach entirely forecloses any individualized determinations. Under Petitioners' regime, Subclass members who pose no flight risk or danger and who will *probably win* relief cannot *even ask* for release on bond, even where the presiding IJ knows they are likely to prevail and present no risk. Due process does not permit prolonged detention under such circumstances, as it serves no valid purpose.

III. UNDER THE DUE PROCESS CLAUSE, DETENTION BECOMES PROLONGED AFTER SIX MONTHS, AND AN INDIVIDUALIZED CUSTODY HEARING IS REQUIRED.

Our legal system has long recognized six months as a significant period of confinement beyond which additional process is required. The Court has also recognized the significance of that period in analogous civil detention contexts, including in *Zadvydas* and in the civil commitment context. National security cases aside, the Court has never approved civil detention of the length here—averaging over a year, with hundreds detained over two years—without an individualized custody hearing.

The relief ordered below takes an appropriate administrable approach to implementing the Fifth Amendment's basic guarantee of liberty, as this

Court has done under similar circumstances. It was well within the lower courts' equitable discretion. *See infra* Point III.A.

Under the Court's civil detention doctrine, due process protections do not evaporate if a detainee can seek habeas relief. Moreover, the record as well as decades of judicial findings confirm that a case-by-case habeas approach fails to protect Class members' interest in physical liberty. *See infra* Point III.B.

At individualized custody hearings, the IJ should consider flight risk and danger, because those are the only permissible bases for these civil detentions. Petitioners fear dilatory conduct by detainees, but experience under the injunction shows their fear is unjustified. IJs can consider dilatory conduct when assessing flight risk and thereby prevent any abuse. *See infra* Point III.C.

A. The Due Process Clause Requires A Custody Hearing For Class Members After Six Months Of Civil Detention.

"It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual . . . ." *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975). The recognition that six months is a substantial period of confinement—and therefore requires additional process to support continued incarceration—is deeply rooted in our legal tradition. With few exceptions, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term." *Duncan*, 391 U.S. at 161 & n.34. Consistent with this tradition, the Court has found six months to be the limit of confinement for a criminal offense that a federal court may impose

without the protection afforded by jury trial. *Cheff*, 384 U.S. at 380 (plurality opinion).

The Government does not generally have greater power to deprive persons of liberty under civil rather than criminal law. That principle is reflected in the use of six months as a dividing line in civil contexts as well. In the civil commitment context, for example, this Court rejected a state's assertion of "the power to confine petitioner indefinitely, without ever obtaining a judicial determination that such confinement is warranted." *McNeil*, 407 U.S. at 249. *McNeil* observed that the state's own maximum of "six months" for observation on an ex parte commitment order provided "a useful benchmark" for the outer limits of civil confinement without a hearing. *Id.* at 250-52.

A six-month hearing rule also finds support in *Zadvydas* and *Demore*. In *Zadvydas* the Court observed that "Congress previously doubted the constitutionality of detention for more than six months," 533 U.S. at 701, and authorized the *release* of individuals who had "been determined to be removable after a fair hearing under lawful and proper procedures." *Id.* at 718 (Kennedy, J., dissenting). The case for requiring neutral evaluation before allowing detention to continue beyond six months is even stronger than in *Zadvydas*, because the Class here includes only individuals who have *not* lost the right to reside in this country. *Cf. id.* at 725 (Kennedy, J., dissenting). The relief ordered is also more limited than in *Zadvydas*, as it provides only for an individualized *hearing* on flight risk and danger, and not necessarily for release. *Id.* (arguing custody procedures should focus on flight risk and danger, not foreseeability of removal).

Similarly, in upholding "brief" mandatory detention, *Demore* emphasized that even outlier cases would typically conclude in "about five months." 538 U.S. at 529-30. As noted previously, both Congress and the Executive Branch have used that same time period in other immigration detention contexts, including in national security cases, as the temporal limit beyond which greater process must be provided. Resp. 38.

In short, outside the national security context, this Court has never authorized civil detention beyond six months without individualized hearings as to whether detention is justified in light of its purpose.

Conducting a *hearing* does not require *release* at any particular point in time. A hearing merely enforces the principle that civil detention beyond six months is unwarranted absent a showing of flight risk or danger. DHS routinely overcomes that presumption: roughly *half* of Class members remain detained after hearings—more often than not because IJs decline to set bond based on individualized review. J.A. 526.

The relief ordered below also is consistent with this Court's longstanding recognition that administrable rules may be necessary to vindicate constitutional protections. *See* Resp. 37 (citing *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010) (14-day limit in interrogation context because "case-by-case adjudication" would be "impractical")); *McLaughlin*, 500 U.S. at 55-56 (48-hour limit on detention prior to probable cause hearing "reasonable" to "provide some degree of certainty" that States act "within constitutional bounds"). *Cf. Zadvydas*, 533 U.S. at 700-01 (citing *McLaughlin* and *Cheff* and adopting six-month rule "for the sake of uniform administration" and avoid the need for lower courts to make "difficult

judgments"). As the Court has recognized, in some circumstances "it is necessary to draw a line." *Duncan*, 391 U.S. at 160-61.

Administrable rules protect "'the individual against arbitrary action of government,'" which this Court "ha[s] emphasized time and again [is] 'the touchstone of due process.'" *Cty. of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998) (alteration omitted). They are particularly appropriate when, in their absence, courts or Government officials would be left "at sea" in attempting to enforce constitutional requirements. *Cheff*, 384 U.S. at 380 (plurality opinion). *See also Shatzer*, 559 U.S. at 110 (specifying time period because "law enforcement officers need to know, with certainty and beforehand," when they can renew interrogation).

The relief ordered below also may be affirmed as a permissible exercise of the district court's equitable power to remedy constitutional violations. Although the district court ruled on statutory grounds by applying constitutional avoidance doctrine, it expressly viewed the injunction as necessary to vindicate Class members' constitutional rights. App. 143a ("the government is constitutionally obligated to provide those hearings"). The Ninth Circuit likewise understood the hearings to serve that function. *See also* App. 30a (affirming district court in part because hearings ensure detention remains supported by "a legitimate interest reasonably related to continued detention"). The record is replete with instances of Class members being incarcerated for periods far longer than six months without any hearing finding a need for such confinement. And the relief ordered is reasonable. The injunction remains flexible by providing a two-week window for setting the hearing,

and by not requiring any hearing where removal or release is imminent. App. 17a, 31a.

B. Requiring Class Members To Seek Relief From Prolonged Detention Solely Through Habeas Would Perpetuate The Denial Of Due Process.

Petitioners believe detainees must file habeas petitions to vindicate their due process rights. Resp. 25-26. But this Court has never excused the Government from providing due process because of the potential availability of habeas relief. *Id.* The Government has an obligation to provide due process regardless of whether a detainee files a habeas petition. *Sopo* v. *U.S. Attorney Gen.*, 825 F.3d 1199, 1217 n.8 (11th Cir. 2016). The record and experience confirm, moreover, that relegating Class members to case-by-case habeas litigation would perpetuate, not prevent, prolonged and unjustified detention.

The district court ordered hearings at six-month intervals based upon extensive and uncontested evidence that detainees face severe barriers in accessing the courts. *See, e.g.*, J.A. 304-09, 518-20. For example, of the approximately 1,000 identified Class members over one year in the Central District, 469 of them were detained for more than a year without an individualized custody hearing, 205 for more than 18 months, and 86 for more than two years. J.A. 73.

Both courts below recognized that detainees lack the legal and language proficiency to litigate on their own. *See* Resp. 26 (quoting App. 48a ("Detainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate.")); App. 143a (finding that the "bond hearing process

would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing").

The record further establishes that many Class members, including longtime lawful residents with U.S. citizen family members and persons convicted of relatively minor offenses, did not obtain bond hearings through habeas even though they presented minimal flight risk or danger. This evidence cannot be dismissed as "anecdote," Reply 15; it derives from a comprehensive expert study of approximately 1,000 Class members over a lengthy discovery period. For example, of the individuals with a criminal history, more than half had received a sentence of no more than six months. *See* Resp. 9. More than half of the Mandatory Subclass had also lawfully resided here for seven years, with at least five years as an LPR, and with no aggravated felony convictions. *See* J.A. 94.

In theory, all of these individuals could have filed habeas cases before the injunction issued, but in reality they were unable to do so. The record thus confirms that a case-by-case habeas approach would foreclose any detention review for many detainees.

The availability of habeas would also fail to remedy the constitutional harm of prolonged detention without a hearing even for the few detainees who could file a habeas petition. Habeas petitions routinely require months or years to resolve. As the First and Second Circuits found, habeas petitions do not provide a meaningful remedy even for extremely prolonged detention. *Lora* v. *Shanahan*, 804 F.3d 601, 615 (2nd Cir. 2015) ("some habeas petitions are adjudicated in months and others are not adjudicated for years"), *cert. denied*, 136 S. Ct. 2494 (2016); *Reid* v. *Donelan*, 819 F.3d 486, 497-98 (1st Cir. 2016) ("federal habeas litigation itself is both complicated

and time-consuming"). *See also* Resp. 26; AIJ Amicus 31 (reporting average length to issue a decision on a prolonged detention habeas is 237 days in the First Circuit, 168 in the Third Circuit, 409 in the Sixth Circuit, and 578 in the Eleventh Circuit). These decision times alone render habeas particularly inadequate as the sole vehicle to challenge prolonged detention.

Case-by-case habeas adjudication of tens of thousands of prolonged detention cases cannot be effectively managed in federal courts. District courts must familiarize themselves with a previously-unknown removal case, all to decide whether to order a bond hearing where an IJ will reconsider largely the same evidence. Even circuits that rejected the six-month rule acknowledged this problem. *Reid*, 819 F.3d at 498 (federal courts' "involvement is wastefully duplicative" and results in "inefficient use of time, effort, and resources"); *Ly* v. *Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) ("federal courts are obviously less well situated to know how much time is required to bring a removal proceeding to conclusion").

Based on extensive findings reviewing immigration detention cases over the past decade, the courts of appeals reached a consensus that a case-by-case approach without temporal guidelines produces arbitrary outcomes. The Second Circuit adopted a six-month rule partly for that reason. *See Lora*, 804 F.3d at 615-16 (observing "the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis," and adopting six-month rule to "avoid[] the random outcomes resulting from individual habeas litigation," particularly where courts have been "burdened by a surge in

immigration appeals and a corresponding surge in the sizes of their immigration dockets").

The Ninth Circuit did the same based on a decade of individual decisions that failed to end prolonged arbitrary detention. App. 111a-14a, 131a (directing class certification to "facilitate development of a uniform framework for analyzing detainee claims to a bond hearing" that "would render management of these claims more efficient for the courts" and "benefit many of the putative class members by obviating the severe practical concerns that would likely attend them were they forced to proceed alone").

Even the circuits that rejected a bright-line approach recognized its practical benefits. The Third Circuit rejected a six-month rule in favor of a case-by-case habeas approach in *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011), but four years of subsequent litigation revealed that system unworkable. In 2015, it acknowledged the uncertainty engendered by the case-by-case approach and suggested alternative time periods akin to a bright line rule. *Chavez-Alvarez* v. *Warden York Cty. Prison*, 783 F.3d 469, 477 n.11 (3d Cir. 2015) (stating a bond hearing is needed between six months and one year "for the sake of providing clear guidance to the" agency and district courts). *See also Sopo*, 825 F.3d at 1217 ("[t]he need for a bond inquiry is likely to arise in the six-month to one-year window"); *Reid*, 819 F.3d at 497-98 ("plethora of problems" associated with case-by-case approach, including "wildly inconsistent determinations" by district courts). *See also* Resp. 37 n.13. As Judge Pryor explained, "despite the best efforts of judges, courts have been unable to apply flexible reasonableness standards in a manner that generates predictable, consistent, and fair outcomes."

Sopo, 825 F.3d at 1226 (Pryor, J., concurring in part and dissenting in part). The experiences of federal appellate courts confronted with this problem thus counsel strongly in favor of a bright-line rule.

Petitioners argue that a bright-line rule encourages dilatory tactics. Br. 11, 13, 24. No evidence supports that claim. In fact, adjudication times in the courts reviewing detainees' cases in the Los Angeles area have shortened since the injunction went into effect four years ago.[13] IJs considering whether to release detainees usually also adjudicate the merits, and therefore can identify dilatory tactics. Such conduct could warrant denial of release on the ground that a detainee who prolongs incarceration to avoid deportation presents a flight risk. IJs thus can address dilatory tactics, but were there any doubt as to this point, this Court can clarify that dilatory tactics will not be tolerated.

C. The Government's Position That Relief Should Be Available Only In Cases Of "Unreasonable Government Delay" Contravenes Settled Due Process Doctrine.

In addition to asserting that Class Members may only obtain review by filing habeas petitions (rather

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[13] *Compare* Decl. of Susan Long, Ex. C, ECF No. 281-6 (average case processing times in FY2013 where relief was granted was 93 days for Mira Loma Detention Facility, 306 days for Orange County Detained, and 648 days for Adelanto Detention Facility East), *with* TRAC Immigration, *Immigration Court Processing Times by Outcome* (Dec. 2016), http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (average case processing times in FY2016 where relief granted was 116 days for Adelanto Detention Facility East, 164 days for Orange County Detained, and 218 days at Adelanto Detention Facility West).

than seeking it directly from IJs), Petitioners contend that the threshold question at any custody hearing should be whether the Government has unreasonably caused delay. Br. 47-48. On their view, if the Government has not unreasonably delayed, no individualized consideration of the detainee's flight risk or danger is warranted. Petitioners' position is contrary to this Court's due process precedents and disregards the factual record.

If the due process test depends on the extent of Government delay, as Petitioners propose, then the test does not serve its core function: to ensure that detention remains reasonably related to its purpose. If an individual presents little flight risk or danger, their prolonged detention serves no valid immigration purpose and is unwarranted. That remains true whether or not the Government has caused unreasonable delay.

Petitioners' focus on whether the Government has engaged in unreasonable delay erroneously presumes that Class members otherwise bear responsibility for the length of their detentions. The record demonstrates that Petitioners have structured immigration proceedings to *require* detainees to seek multiple adjournments to present their defenses. *See* Resp. 23-24; *see also* Br. of Retired IJs and BIA Members 2-6. Furthermore, detainees have no control over how long the BIA and circuit courts take to resolve appeals, which routinely take years. Resp. 25.

Petitioners' approach would lead to the type of pervasive inconsistency the circuits uniformly decry. *See supra* Point III.B. Judges (whether district courts, as Petitioners propose, or IJs) will have to assign blame for delays. Is delay unreasonable if a busy docket triggers lengthy continuances? *See, e.g.*, Resp. 24 (IJ continued matter for four months and

denied motion to shorten continuance). What if the delay arises from a different sub-agency's backlogs in processing applications? *See* J.A. 32-33 (class member detained for over a year while DHS processed and granted I-130 petition). How should a judge "count" the time spent detained pending an appeal by the Government? J.A. 235 (class member detained 7 months during DHS appeal). Attempting to determine the extent of the Government's responsibility for delay will itself introduce needless litigation and exacerbate inconsistency.

Mr. Rodriguez's case illustrates the flaws with Petitioners' approach. Petitioners dismiss any due process concerns with his three-and-a-half year detention because "three quarters of that time was under a stay of removal he requested" and he could have sought to "expedite" the appeal. Reply 14. But the Government successfully requested and obtained three separate stays of his case pending resolution of another, which delayed consideration of his case for nearly two years. *See* Corrected Pet'n for Habeas Corpus 8-10 (D.Ct. May 29, 2007); J.A. 258. It then moved to remand his case after belatedly conceding he was not removable as charged. *See* J.A. 258.[14]

Whether the "fault" for this delay lies with him, the Government, or neither party has nothing to do with the core due process concern the hearing is designed

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[14] Petitioners also suggest the record supports alternative "time frames" for conducting hearings based on the average length of Class members' cases. Reply 20-21 (in 90% of cases, IJ proceedings completed within 14 months and BIA appeals within 20 months). Petitioners would base the constitutionally-acceptable time period for detention without a hearing on the length of bureaucratic delays driven by court funding shortfalls, rather than liberty interests. Nothing in the Court's civil detention precedents supports that approach.

to address: whether further prolonged detention is reasonable in light of whatever flight risk or danger he presents.

* * *

For these reasons, the Court should affirm the relief ordered below of individualized custody hearings after approximately six months, held directly before IJs, to protect Class members' due process rights.

IV. DUE PROCESS REQUIRES CERTAIN SAFEGUARDS AT CUSTODY HEARINGS FOR PROLONGED DETENTION.

At prolonged detention custody hearings, due process requires that the Government bear the burden of proof; the standard of proof be clear and convincing evidence; and the IJ consider the length of detention in determining whether detention remains justified. Due process also requires periodic hearings for those individuals who face additional prolonged detention.

A. Due Process Requires The Government To Bear The Burden Of Proof By Clear And Convincing Evidence.

1. The Government Must Bear the Burden of Proof.

In every context where the Court has considered the constitutionality of civil detention or comparably severe deprivations of individual liberty, the Government has borne the burden of proof. Resp. 49. In civil detention cases, the Court has struck down schemes that place the burden on the detainee. *See, e.g., Foucha,* 504 U.S. at 81-83; *see also Zadvydas,* 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia,* they

placed burden on detaince). Conversely, the Court has upheld civil detention schemes that place the burden on the Government. *See, e.g.*, *Salerno*, 481 U.S. at 741; *Kansas* v. *Hendricks*, 521 U.S. 346, 364 (1997). When the Court has considered other "particularly important individual interests," *Addington* v. *Texas*, 441 U.S. 418, 424 (1979), such as parental termination, deportation, and denaturalization, the burden of proof has been on the Government, not the individual. Resp. 49 (citing cases).

The Court should not deviate from the established rule here. As in the civil commitment and pretrial detention contexts, because the Government seeks to deprive Class members of physical liberty to prevent future danger or flight, it must bear the burden of proof. *See Addington*, 441 U.S. at 425 (standard of proof "reflects the value society places on individual liberty").

2. The Court's Precedent Requires the Standard of Proof To Be Clear and Convincing Evidence.

The Court repeatedly has held that when the Government seeks to deprive an individual of a "particularly important individual interest[]" that is "more substantial than mere loss of money," *id.* at 424, it bears the burden of proof by clear and convincing evidence. Br. 49 (citing cases).

Although the Bail Reform Act uses a "preponderance of the evidence" standard for flight risk determinations, it does so in the context of the "stringent time limits of the Speedy Trial Act" on pretrial detention, *Salerno*, 481 U.S. at 747, not the prolonged detention lengths at issue here. *See* 18 U.S.C. 3161(c)(1) (requiring criminal trial to begin within seventy days of indictment); *Salerno*, 481 U.S.

at 747 n.4 (expressing "no view as to the point at which detention in a particular case might become excessively prolonged [under the Act], and therefore punitive, in relation to Congress' regulatory goal"). Greater protections are required when detention becomes prolonged. *See supra* Point I.A; *see also Zadvydas*, 533 U.S. at 690 (recognizing need for greater governmental justification as detention length increases).

3. Application of the *Mathews* v. *Eldridge* Due Process Standard Also Demonstrates That the Government Must Bear the Burden by Clear and Convincing Evidence.

Under the framework set forth in *Mathews* v. *Eldridge*, the Court balances the private interest at stake, the risk of erroneous deprivation if the detainee bears the burden, and the corresponding imposition on the Government. 424 U.S. at 335.

Here, the prolonged incarceration Class members suffer deprives them of a "particularly important" interest. *Addington*, 441 U.S. at 424. *See also Zadvydas*, 533 U.S. at 690.

Unless the Government bears the burden by clear and convincing evidence, the risk of erroneous deprivation of that liberty interest in custody hearings is impermissibly high. The Government is represented at hearings by attorneys familiar with immigration court procedures, while the noncitizen is by definition detained, often unrepresented, and frequently lacks English proficiency. *See supra* Point III.B. *Cf. Santosky* v. *Kramer*, 455 U.S. 745, 762-63 (1982) (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous

factfinding" including that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and "[t]he State's attorney usually will be expert on the issues contested").

Moreover, the Government's attorneys are far more able to produce documents and other evidence to meet their burden than are incarcerated Class Members, who would otherwise be tasked with obtaining records—including court documents, marriage and birth certificates, or actuarial risk statistics—after having spent at least six months in detention, where they have limited access to the Internet, mail, phone, and a reduced ability to pay for and store records. *See* J.A. 304-06, 520-24; App. 143a (district court finding that the "bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing").

The risk of erroneous deprivation is equally substantial for Arriving Subclass Members. DHS has by definition had six months to collect information (including by interviewing the detainee, who is incarcerated and readily available). DHS already verifies asylum-seekers' identity as part of the application process. *See* 8 U.S.C. 1158(d)(5)(A)(i) (requiring identity check); 8 C.F.R. 1003.47. Even beyond information supplied by the detainee, DHS has access to the detainee's immigration records, other law enforcement records, and State Department, Department of Defense, intelligence, and international (including INTERPOL) databases on a real-time basis, including through biometric fingerprinting.[15] If an individual detainee is a recent

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[15] *See* DHS, *Privacy Impact Assessment for the TECS System: CBP Primary and Secondary Processing* 9-10 (Dec. 22, 2010),

entrant who lacks any community ties, who has no one to vouch for him, and whose background truly cannot be verified after the Government makes an effort to do so, the Government may present that information as evidence of flight risk and the IJ may deny release. This would not be inconsistent with placing the burden on the Government.

Finally, placing the burden on the Government imposes a minimal burden. Four years of record evidence shows that the Government has ample information from which to make its case for continued detention, as it prevents release in approximately half of all cases. *See* J.A. 528, fig.1, 529, fig.2. *Cf. Zadvydas*, 533 U.S. at 723-24 (Kennedy, J., dissenting) (reviewing release rates in assessing placement of burden of proof).

4. The Relief Ordered Below Is Consistent With the Court's Plenary Power Decisions.

Petitioners' principal response to the additional safeguards ordered by the Ninth Circuit is that the Government need only show a "facially legitimate and bona fide" basis for detention under the plenary power doctrine, *see* Br. 54 (citing *Fiallo*, 430 U.S. at 794-95).

But the cases Petitioners cite do not concern detention at all, let alone prolonged detention, where the plenary power is "subject to important constitutional limitations." *See* Op. 51-52 (citing *Zadvydas*, 533 U.S. at 695). *Fiallo* concerned the

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https://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-cbp-tecs.pdf; DHS, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)* 3-5 (Dec. 7, 2012), https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-06252013.pdf.

terms under which Congress could deny *admission* (by denying citizenship). 430 U.S. at 788-89. The only other opinions of the Court to apply that standard involved the *admission* of noncitizens. *See Din* v. *Kerry*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring) (citing *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972)). As Justice Kennedy has explained, in those cases the breadth of "congressional power to make rules for the exclusion of aliens" justified limited review of the "executive officer's decision denying a visa." *Id.* at 2140.

Here, in contrast, Class members face prolonged detention because no decision concerning their deportation or admission has been made; many of them were already admitted, and many others will be granted admission as a result of the proceedings. Resp. 9-10.[16] The relief ordered below thus comports with Congress's plenary power over admissions.

B. The Government Must Provide Periodic Hearings To Support Prolonged Detention.

Under 8 C.F.R. 1003.19(e), a detainee may request an additional custody hearing based on changed circumstances. Br. 54-55. But because the agency does not count additional time in detention as a "changed circumstance," a detainee like Mr. Rodriguez cannot obtain a new custody hearing based on the passage of time. J.A. 317. Due process, however, requires periodic hearings for those who remain detained for prolonged periods after an initial hearing to assess whether continued detention

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[16] Respondents cite the oral argument transcript and Justice Breyer's opinion in *Demore* regarding the standard that should govern *initial* detention under 8 U.S.C. 1226(c), Reply 23, but this case concerns *prolonged* detention.

remains reasonable in relation to its purpose. *See Mathews*, 424 U.S. at 335 (greater procedural protections required when the private interests at stake are weightier). This Court has recognized that "[a] confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." *McNeil*, 407 U.S. at 249. In *Jackson* v. *Indiana*, the Court found lengthy pretrial detention of incompetent criminal defendants unconstitutional where "[t]here is no statutory provision for periodic review of the defendant's condition." 406 U.S. at 720.

Application of the *Mathews* due process standard demonstrates the need, during prolonged detention, for periodic hearings. The deprivation of liberty for Class members detained for longer than six months is profound. It is undisputed that even after six months of incarceration (when they become Class members), many still face lengthy future detention, often for years. More than half of Class members detained past six months were still detained at 12 months; 23% of them were still detained at 18 months; and 10% were still detained at 24 months. J.A. 74-75 & tbl.4; App. 18a-19a. Lead Plaintiff Alejandro Rodriguez was detained for more than three years and three months, and would have been detained for seven years if not for this case. *See* J.A. 257-60.

Finally, conducting periodic hearings imposes minimal costs on the Government. Petitioners stipulated that "the cost of providing a bond hearing should [not] be considered in this case as a factor weighing in [their] favor." J.A. 588. Petitioners already conduct numerous bond hearings; they are typically brief (ten to fifteen minutes) and often occur via video conference. *See* J.A. 573. And because detention costs dwarf supervision costs, Mot. for

Summ. J. 20-21, ECF No. 281, hearings for Class members have saved millions of dollars. J.A. 529, fig.2; J.A. 88-89, tbl.18.

C. Immigration Judges Must Consider Length Of Detention At Prolonged Detention Custody Hearings.

This Court's focus on detention length in *Demore* and *Zadvydas* demonstrates why the length of past detention must be considered as a factor at custody hearings. As detention length grows, greater justification is required to sustain it. *Zadvydas*, 533 U.S. at 701. *See also* Br. 47 (conceding that longer detention requires greater scrutiny). Thus, when courts have considered *prolonged* pretrial detention, they have required consideration of additional factors "such as the length of the detention." *United States* v. *Hare*, 873 F.2d 796, 801 (5th Cir. 1989). *See also United States* v. *Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (per curiam).

Mr. Rodriguez's case is illustrative. Under the Government's position, the Government could justify his detention with the *same* showing after six months of detention as after six years (he won his case after seven). Due process does not permit that result.

The Ninth Circuit's procedures do not, as Respondents suggest, "count[] twice" detention length. Reply 23. Respondents conflate the availability of periodic hearings with the *showing* that the Government must make at the hearing. Unless immigration judges consider detention length when assessing the Government's justification for additional detention, the Government could justify prolonged terms of detention based only on the same initial showing it made at the first bond hearing.

That runs counter to *Zadvydas* and cannot be the law.

CONCLUSION

For these reasons and those in Respondents' Brief, the Court can affirm the decision below on statutory grounds and under the Constitution.

Respectfully submitted,

MARK H. HADDAD
SEAN A. COMMONS
SIDLEY AUSTIN LLP
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

JUDY RABINOVITZ
MICHAEL K. T. TAN
CECILLIA D. WANG
AMERICAN CIVIL
LIBERTIES FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2618

DAVID D. COLE
AMERICAN CIVIL
LIBERTIES FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 544-1681

AHILAN T. ARULANANTHAM*
MICHAEL KAUFMAN
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-5211
aarulanantham@aclusocal.org

JAYASHRI SRIKANTIAH
STANFORD LAW SCHOOL
IMMIGRANTS' RIGHTS CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-2442

Counsel for Respondents

* Counsel of Record

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